No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1958

LURTON LEWIS HEFLIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 23–24) is reported at 251 F. 2d 69. That court's prior opinion is reported at 223 F. 2d 371. The opinion of the District Court (R. 20) denying petitioner's motion to correct sentence is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1958. The petition for a writ of certiorari was filed on March 31, 1958, and was granted on June 30, 1958 (R. 25, 357 U. S. 935). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, who is now in custody under an admittedly valid ten-year sentence for bank robbery, may at this time and in this proceeding attack a year-and-a-day consecutive sentence imposed under a count charging the receipt, concealment, and disposal of the stolen money.

2. Whether a person who has been convicted of both robbing a bank and later disposing of the proceeds may be punished by consecutive sentences under 18 U. S. C. 2113.

3. Whether separate punishment for these offenses constituted double jeopardy.

STATUTES INVOLVED

1. 18 U. S. C. 2113, commonly called the Bank Robbery Act, provides in pertinent part as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * * * *

2. Subsection (c) as originally passed in 1940, 54 Stat. 695, 12 U. S. C. (1946 ed.) 588b (c), read as follows:

> (c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

3. 28 U. S. C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> * * * * *

4. Rule 35 of the Rules of Criminal Procedure is as follows:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the

judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On February 26, 1954, Lurton Lewis Heflin, Jr., and two others were indicted in five counts growing out of a 1953 bank robbery. Count 1 charged a robbery from the person of $53,172.73 under 18 U. S. C. 2113 (a), *supra*, pp. 2–3 (R. 7–8). Count 2 charged them with stealing and carrying away the bank funds in violation of 18 U. S. C. 2113 (b), *supra*, p. 3 (R. 8–9). Count 3 charged that in committing the bank robbery they put the lives of 12 people in jeopardy by use of pistols and revolvers in violation of 18 U. S. C. 2113 (d), *supra*, p. 3 (R. 9–10). Count 4 charged that between January 23, 1953, and February 24, 1954, they had concealed and disposed of the stolen funds in violation of 18 U. S. C. 2113 (c), *supra*, p. 3 (R. 10). Count 5 charged that between January 1, 1953 and February 24, 1954, they conspired to commit the previous offenses in violation of 18 U. S. C. 371 (R. 11–12).

Petitioner was tried alone and on May 15, 1954, was convicted by a jury on all five counts (R. 4). He was sentenced to consecutive sentences as follows:—10 years on count 3; 5 years on count 1; 3 years upon count 5; 1 year and 1 day on count 2; and 1 year and 1 day upon count 4—a total of 20 years and 2 days (R. 4). He filed notice of appeal (R. 5). One of the errors urged upon appeal was the invalidity of the

sentences imposed under counts 1, 2, 3 and 4, all based upon the Bank Robbery Act. *Heflin* v. *United States,* 223 F. 2d 371, 373. Upon confession of error by the government, the Court of Appeals found that subsections (a), (b) and (d) of Title 18, U. S. C., Section 2112, *supra,* pp. 2–3, create different maximum punishments for bank robbery and therefore only a single sentence should have been imposed under counts 1, 2 and 3. The court held, however, that "receiving stolen money and conspiracy are offenses separate from bank robbery, and consist of distinctly different elements." *Heflin* v. *United States, supra,* 223 F. 2d at 376.

The Court of Appeals on September 6, 1955, remanded the case for resentencing (R. 6, 12–13). The District Court on September 14, 1955, corrected the judgment by eliminating counts 1 and 2 and imposing the same sentences previously given on the remaining counts, so that petitioner's total sentence was reduced to 14 years and 1 day (R. 6, 13–15).

This Court decided *Prince* v. *United States,* 352 U. S. 322, on February 25, 1957. On May 14, 1957, petitioner filed a new motion under either Rule 35, F. R. Crim. P., or 28 U. S. C. 2255, to correct his sentence. He again complained of his sentence under both subsections (c) and (d) of 18 U. S. C. 2113 and stated that the *Prince* case was now controlling (R. 7, 16–17). The District Court denied the motion (R. 7, 20), and again petitioner appealed (R. 7, 21).

The Court of Appeals in a *per curiam* opinion noted that it had previously

> expressly held that Heflin was not entitled to the relief he here seeks. In the absence of a claim that such prior judgment of this court was in some way brought about under circumstances that would deprive the court of the power to act, we cannot now review or reconsider that judgment. [R. 24, *Heflin* v. *United States*, 251 F. 2d 69, 70.]

But the Court of Appeals also stated:

> It is not inappropriate, however, to say that we think it perfectly clear that the offenses set out in Sections (c) and (d) are distinct crimes and neither is merged into the other. [R. 24, *Heflin* v. *United States, supra*, 251 F. 2d at 70].

SUMMARY OF ARGUMENT

I

The preliminary question in this case is one of jurisdiction. Petitioner is now in custody under an admittedly valid ten-year sentence for bank robbery. He has not completed service of this sentence (nor a consecutive conspiracy sentence). Under these circumstances, even if his contentions as to his consecutive sentence of a year and a day (the sentence challenged here) are correct, the motion under 28 U. S. C. 2255 does not properly lie because he cannot be released from custody upon a judgment in his favor. Cf. *McNally* v. *Hill*, 293 U. S. 131, so ruling with respect to habeas corpus, the prototype of Section 2255.

Under Rule 35, F. R. Crim. P., petitioner may make a motion at any time to correct an illegal sentence. But since this is a motion in the criminal case it can be reviewed only by petition for a writ of certiorari

filed within thirty days after judgment in the Court of Appeals. Rule 22 (2) of the Rules of this Court. Therefore, if petitioner seeks review of his denial of relief under Rule 35 he is untimely in the present proceeding since his petition for certiorari was filed more than thirty days after the Court of Appeals' judgment.

However, recognizing that petitioner can again raise the legality of his sentence under Rule 35, we proceed to the merits.

II

Subsection (c) of the Bank Robbery Act, 18 U. S. C. 2113, *supra*, p. 3, punishes any person who "receives, possesses, conceals, stores, barters, sells or disposes," of property known to have been stolen from a federally insured bank. Petitioner claims he cannot be punished under this section because he was punished as the robber. He relies largely upon *Prince* v. *United States*, 352 U. S. 322, which held that Congress did not intend separately to punish the crime of entering a bank with intent to rob, and the consummated robbery. However, the elements of the offense of disposal bear a different relationship to the elements of a bank robbery than do the elements of the crime of entry; also, the legislative history is different from that involved in *Prince*.

A. 1. The legislative history shows that the portion dealing with *disposition* of the proceeds of a bank robbery was passed at the instance of the Attorney General in 1940 (after the original 1934 Act with respect to bank robbery, and the 1937 amendments) and was intended to create a separate substantive offense. Petitioner does not deny this but argues that

this offense should not be applied to a participant in the robbery.

The short answer is that to accomplish this meaning petitioner is in effect amending the Act to read: whoever disposes, etc. of money "received from a person" who participated in the robbery, shall be punished. Congress, instead, used all-inclusive language which covers both the robber and the "fence" who did not himself rob.

2. Furthermore, the legislative history indicates that the wording of the "disposal" section came directly from the National Stolen Property Act and the Kidnapping Act; in turn, that wording came from the National Motor Vehicle Theft Act. Therefore, presumably, the words have the same purpose and scope in all the statutes. By 1940, when this "disposal" section was added to the Bank Robbery Act, the other acts had been interpreted as permitting separate punishment of one person who both transported and also disposed of stolen property.

B. 1. Since new and independent conduct is indispensable to accomplish the disposal of the "loot" after the bank robbery, there is reason to suggest that there should be a separate punishment for the added criminal acts. The action necessary to "dispose" of something is additional to that required to "take" it. This is why the *Prince* case, *supra,* does not apply here. There, the heart of the crime was the theft. The entry with intent to rob was held to have merged into the consummated robbery. This cannot be said of the provision with respect to the proceeds. Disposal of the loot necessarily must come after a consummated

robbery, and involves an independent criminal impulse and separate acts; it cannot merge with the robbery itself.

2. In the government's brief in *Woody* v. *United States*, No. 135, this Term, we point out that the rule of lenity applies where Congressional intent is unclear with respect to interpreting one single act as subject to consecutive punishment. But *Ladner* v. *United States*, No. 2, this Term, decided December 15, 1958, makes clear that the considerations are different where there are separate acts of criminality as a result of separate impulses. Since here the subsection at issue (subsection (c)) punishes an act separate from the robbery itself, both the language of the statute and the legislative history show that Congress intended to provide an added punishment for the distinct violations.

3. In particular, subsection (c) clearly covers the robber when he so conceals or disposes of the proceeds that they are not recovered—as here. Society's special and separate interest in deterring and punishing that conduct is apparent.

III

Petitioner also raises the question of whether separate punishments for both robbery and disposition of the stolen proceeds by one person violate the double jeopardy provision of the Constitution. This contention clearly has no merit and petitioner does not labor it. As shown, *supra*, there is in this case more than one act of criminality. As such, there is no constitutional barrier to double punishment even under the view of the dissenting opinions in *Gore* v. *United States*, 357 U. S. 386.

ARGUMENT

I

PETITIONER, WHO IS NOW IN CUSTODY UNDER AN ADMITTEDLY VALID TEN-YEAR SENTENCE FOR BANK ROBBERY, CANNOT AT THIS TIME AND IN THIS PROCEEDING ATTACK HIS YEAR-AND-A-DAY CONSECUTIVE SENTENCE FOR DISPOSING OF THE PROCEEDS

In the government's brief in opposition to the petition for a writ of certiorari, we pointed out that there is an initial problem of jurisdiction in this case. Petitioner has not yet completed service of the admittedly valid ten-year sentence for bank robbery which precedes the one-year-and-a-day sentence now under attack. Thus, even if his contentions are correct, he cannot be released from custody.

A. Under these circumstances we do not think his motion properly lies under 28 U. S. C. 2255. By unbroken tradition, both in this country and in England, the relief afforded by the writ of habeas corpus is to protect against unlawful detention and the writ will be granted only when it will result in the prisoner's immediate release. Therefore, when consecutive sentences are imposed, a sentence which the prisoner has not begun to serve cannot be questioned, because it is not the cause of the prisoner's restraint at the time he seeks the relief of the court. *McNally* v. *Hill*, 293 U. S. 131, 138.

The same is true as to a proceeding under Section 2255. The sole purpose of enacting this section was "to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." *United States* v.

Hayman, 342 U. S. 205, 219. Accordingly, it has been held that relief under Section 2255 cannot be granted where the prisoner is subject to another concurrent sentence which is concededly valid [1] or, as here, where the sentences are consecutive.[2] See *United States* v. *Morgan,* 346 U. S. 502, recognizing that custody under the sentence attacked is essential to a proceeding under 28 U. S. C. 2255.

B. Under Rule 35, F. R. Crim. P., *supra,* pp. 4–5, a motion to correct an illegal sentence may be made at any time. However, such a motion is in the criminal case. *United States ex rel. Coy* v. *United States,* 316 U. S. 342. As such, the petition for a writ of certiorari, filed more than thirty days after the judgment of the Court of Appeals sought to be reviewed, is out of time under Rule 22 (2) of the Rules of this Court.[3]

We recognize, however, that if petitioner should properly prevail under Rule 35, the same issue could be raised by a new motion under that rule, and to that extent the question is not academic at this time. Accordingly, we discuss in Points II and III, *infra,* the merits of petitioner's contention that separate sen-

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[1] *Oughton* v. *United States,* 215 F. 2d 578, 579 (C. A. 9), certiorari denied, 352 U. S. 975; *United States* v. *McGann,* 245 F. 2d 670, 672 (C. A. 2); *Lambert* v. *Schneckcloth,* 241 F. 2d 711, 712 (C. A. 9).

[2] *Hoffman* v. *United States,* 244 F. 2d 378, 381 (C. A. 9).

[3] The same time limitations would apply if the assumption is made that petitioner's application could be considered as one in the nature of a writ of error coram nobis, despite the future possibility of a proceeding under 28 U. S. C. 2255. Such a motion or proceeding is also in the criminal case. *United States* v. *Morgan,* 346 U. S. 502.

tences could not be imposed for bank robbery and disposition of the loot.[4]

II

THE LANGUAGE AND LEGISLATIVE HISTORY OF THE BANK ROBBERY ACT INDICATE THAT CONGRESS INTENDED TO CREATE SEPARATE OFFENSES FOR ROBBING A BANK AND DISPOSING OF THE STOLEN FUNDS, WHETHER OR NOT THE DISPOSAL OF THE FUNDS WAS BY A PERSON WHO PARTICIPATED IN THE ROBBERY

Subsection (c) of 18 U. S. C. 2113, *supra*, p. 3, punishes any person who "receives, possesses, conceals, stores, barters, sells, or disposes of" any money or thing of value known to have been stolen from a federally insured bank. Petitioner argues that, while this is a separate offense from the robbery, there cannot be separate punishment for that offense against one who participated in the robbery. He relies largely on *Prince* v. *United States*, 352 U. S. 322, for his position that Congress did not intend to punish separately the robbing of a bank and the disposition of the money taken in the robbery. In that case the Court held that the crime of entry into a bank with intent to rob, which could be a peaceful entry, was not intended by Congress to be a separate offense from the consummated robbery—that the provision with re-

[4] Since the substantive issue of sentencing presented in this case turns on the allegations on the face of the indictment (*i. e.*, that petitioner was himself a participant in the robbery), we do not urge that, aside from the question of custody, Section 2255 would be unavailable to petitioner. See the discussion in the Government's brief in *Woody* v. *United States*, No. 135, this Term. For the same reason, we now believe that a motion under Rule 35, F. R. Crim. P., would be an appropriate proceeding.

spect to unlawful entry was designed to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. However, the Court there noted, 352 U. S. at 325, that it was—

> * * * dealing with a unique statute of limited purpose and an inconclusive legislative history. * * * The question of interpretation is a narrow one, and our decision should be correspondingly narrow.

The elements of the offense here involved (receipt and disposition of the stolen funds) bear a different relationship to the elements of the crime of robbery than do the elements of the crime of entry with which *Prince* was concerned. And the legislative history of the enactment at issue here is different from that involved in *Prince*. Both, we believe, show a Congressional purpose to make the disposition of stolen funds a separate crime, even when the funds are disposed of by a person who participated in the robbery.

A. THE STATUTE PUNISHING DISPOSITION OF THE PROCEEDS OF THE ROBBERY WAS PASSED LATER THAN THAT PUNISHING THE ROBBERY, AND SERVES A DIFFERENT PURPOSE

1. While the bank robbery provisions were substantially complete by 1937, it was not till June 29, 1940, that Congress saw fit to enact 54 Stat. 695, punishi ; disposition of the proceeds of the robbery. As originally passed, this subsection provided:

> (c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in viola-

tion of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both. [54 Stat. 695; 12 U. S. C. (1946 ed.) 588b (c).]

The legislative history, although short, is to the point. Both the House and Senate passed the Act without comment, amendment, or debate. 86 Cong. Rec. 2314, 8940. The House and Senate reports are composed for the most part of almost identical letters from the then Attorney General, Robert H. Jackson, proposing the Act in the form in which it was finally passed. House Report No. 1668, 76th Cong., 3d Session; Senate Report No. 1801, 76th Cong., 3d Session. The letter states in part:

> * * * Under existing law, it is a *separate substantive offense* knowingly to receive or possess stolen property transported in interstate or foreign commerce in violation of the National Stolen Property Act (U. S. C., title 18, sec. 416). Existing law likewise makes it an offense knowingly to receive, possess, or dispose of money or property paid as ransom in violation of the Federal Kidnaping Act (U. S. C., title 18, sec. 408c–1).
>
> On the other hand, the Federal bank robbery statute is not implemented in this manner. The statute does not make it a *separate substantive offense* knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act (U. S. C., title 12, sec. 588a–d).
>
> Accordingly, I enclose herewith a proposed bill making it an offense to receive, possess, conceal, barter, sell, or dispose of any money

> or property knowing that the same has been feloniously taken from a bank in violation of the Federal Bank Robbery Act. [Emphasis added.]
>
> * * * * *

There can thus be no doubt that Congress did intend the statute relating to disposition of the proceeds to be a substantive offense separate from the robbery.

Petitioner does not deny that the Act creates a separate offense. He argues that the separate offense does not apply to the participant in the robbery. Both the language and the legislative history suggest otherwise. The terms of subsection (c), read naturally, cover action subsequent to the robbery both by the robber and by a separate receiver. While "receiving" and "possessing" would inevitably be an immediate part of the robbery, the other words used in the subsection—particularly "barter, sell, or dispose"—relate to acts *subsequent to the robbery* which could and would be performed by the person in possession of the proceeds, *i. e.*, by one who participated in the robbery. If only the confederate or "fence" (who did not himself rob) were intended to be covered, the statute would logically read "whoever possesses, sells, disposes of, * * * money *received from a person* who participated in the robbery." The use by Congress of all-inclusive language which covers both the taker and the "fence" supports the conclusion that the purpose was not only to create a separate offense, but to include in its coverage everyone, including the robber, who violates its terms.

2. Moreover, the words of present subsection (c) were taken from the National Stolen Property Act and the Kidnapping Act.[5] The intent presumably was that they would have the same purpose and scope as the words in those Acts. These terms in the National Stolen Property Act, 18 U. S. C. 2315, came in turn explicitly and directly from the National Motor Vehicle Theft Act, 18 U. S. C. 2313. See House Report No. 1462, 73d Congress, 2d Session, p. 2.[6] While in those other crimes (in contrast to bank robbery) the act of stealing would often not be a federal crime, the act of transporting stolen goods (which those acts punished) may be deemed analogous to the robbery made a crime by the federal Bank Robbery Act. In 1940, when the statute here involved was passed, it had already been well established in decisions of the courts of appeals (which the Attorney General must have known) that a transporter of a stolen vehicle, or of stolen goods, could be *separately* punished for concealment or disposition of such articles. *Doll* v. *Johnston,* 95 F. 2d 838 (C. A. 9, 1938), certiorari denied, 304 U. S. 574; *Chrysler* v. *Zerbst,* 81 F. 2d 975 (C. A. 10, 1936); *York* v. *United States,* 299 Fed. 778 (C. A. 6, 1924). There is thus little reason to believe that

[5] The National Stolen Property Act at that time, 18 U. S. C. (1946 ed.) 416, used the words, "received, conceal, store, barter, sell, or dispose * * *." The Kidnapping Act at that time, 18 U. S. C. (1946 ed.) 408c–1, used "receives, possesses, or disposes". The seven different verbs used in the instant provision are obtained by combining these two acts.

[6] Cf. same or similar wording in National Stolen Cattle Act, 18 U. S. C. 2317; Postal Matter, 18 U. S. C. 1708; Interstate Freight, 18 U. S. C. 659.

the Attorney General, when he suggested the statute, or Congress, when it enacted it, deemed it inapplicable to a participant in the robbery.

3. The only other change in the Act which is relevant to our problem occurred in the Title 18 codification passed on June 25, 1948, 62 Stat. 796. Previously, the "disposition" provision, 12 U. S. C. (1946 ed.) 588b (c), *supra*, p. 4, fixed punishment as:

> shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

The 1948 provision, now in effect (18 U. S. C. 2113 (c)), concludes (*supra*, p. 3):

> shall be subject to the punishment provided by said subsection (b) for the taker.

The 1948 revision provided generally with respect to offenses of theft, and in particular with respect to the larceny provisions of Section 2113 (b), that the taking of less than $100 would be a misdemeanor. The reference to the same punishment as "for the taker" was a short-hand way of making the same distinction. We do not believe it indicates a construction one way or the other of the coverage of subsection (c).

In the brief discussion on the floor of the Senate in response to an inquiry from Senator Taft for explanation of the Title 18 codification bill, Senator Wiley (of the Judiciary Committee) stated, "The original intent of Congress is preserved." 94 Cong. Rec. 8721. Also see Senate Report No. 1620, p. 1, 80th Congress, 2d Session. Consequently, to read any special significance into the use of the word "taker" is contrary to the express purpose of Congress to make no substantial changes in Title 18. The change

in degree of punishment in subsection (c) to conform to the difference in amount stolen still remains fully consistent if we view the robber and disposer (in a particular case) as the same person. The punishment in subsection (c) does not depend on the amount "taken" but on the amount *disposed of*. That could be either by the robber or by another.

B. SINCE DISPOSITION OF STOLEN FUNDS NECESSARILY INVOLVES CRIMINAL ACTS BEYOND THOSE INVOLVED IN THE ROBBERY ITSELF, THERE IS REASON WHY A PARTICIPANT IN THE ROBBERY SHOULD BE SEPARATELY PUNISHED FOR THE ADDITIONAL CRIMINAL ACTS

1. As already noted, subsection (c) punishes any person who "receives, possesses, conceals, stores, barters, sells, or disposes of" any money or thing of value known to have been stolen from a federally insured bank. We have also pointed out that the act of receiving and possessing may occur at the time of the robbery, but the other acts prohibited (concealing, storing, etc.)—in particular, the act of *disposing* of stolen funds—necessarily involve something subsequent to and apart from the robbery itself. The disposition of the "loot" must of necessity come after the bank robbery and cannot be an element of the robbery. And since the act of disposing of the stolen funds is necessarily an act subsequent to and apart from the robbery, it likewise involves a different intent, and a further act of criminality than that involved in the robbery itself. No doubt every bank robber hopes to dispose of the money taken, but his act of disposing of the money is nevertheless something beyond the robbery itself; it is new and independent

conduct on his part which the law can properly try to deter.

This factor marks an important distinction between the problem of this case and that of *Prince*. In *Prince*, the Court noted (352 U. S. at 328) that "the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated." This cannot be said of the section here involved. In subsection (c), dealing with the stolen funds, the gist of the crime is the intent to get rid of the property. As such, it carries within its magnetic field all the degrees and methods of disposition. By analogy to *Prince*, the lesser offense (like intent to enter in *Prince*) is "receiving." In turn, this element is usually included within "concealing, storing or possessing" and these may merge into "barter, sell or dispose". The "loot" provision thus contains its own degrees and consummation of purpose; it was intended to be a statute punishing acts other than, and subsequent to, the robbery. Moreover, the crime of disposition of the proceeds carries a lesser degree of punishment than robbery, and as we have shown above it was not made a crime either when bank robbery was first made a federal offense in 1934, or when the crimes of larceny and unlawful entry were added in 1937. In sum, all the indications are that Congress did not intend the robbery to merge into the later offense of "disposition".

This Court has on several occasions interpreted comparable criminal provisions as establishing two or more offenses for successive steps in a chain of actions taken for illicit ends. For example, *Morgan*

v. *Devine*, 237 U. S. 632, upheld consecutive sentences for forcibly entering a post office to commit larceny and for then stealing postage stamps at the same time and place. *Burton* v. *United States*, 202 U. S. 344, sustained separate convictions for unlawfully receiving outside compensation for government services, and also for agreeing to receive that very compensation. In *Albrecht* v. *United States*, 273 U. S. 1, the defendants were convicted, under the National Prohibition Act, on separate counts of possessing and selling the same liquor at the same time. *United States* v. *Michener*, 331 U. S. 789, held that consecutive sentences could be imposed on one count charging possession of a plate adapted for counterfeiting and on a second count charging that on the same day the defendant caused such a plate to be made. In all of these cases, the second step was a normal concomitant of the first; but the Court nevertheless accepted the steps as separate and distinct, involving different elements, different proof, and independent criminal impulses.

2. As developed more fully in the government's brief in *Woody* v. *United States*, No. 135, this Term, the recent decisions of this Court involving multiple offenses have related to situations where one single transaction has given rise to consecutive sentences. The rule of lenity applies against permitting multiple punishment for a single transaction unless the Congressional purpose to do so is clear. But nothing in that rule suggests that separate acts of criminality are not separate offenses, or that such separate crimes shall be considered one crime simply because they are

now set out in the same section of a statute. The decision in *Ladner* v. *United States*, No. 2, this Term, decided December 15, 1958, makes clear that the singleness or plurality of the criminal impulse is an important factor on the issue of consecutive punishment, since the Court there remanded the case for determination as to whether the consecutive sentences were imposed for the firing of one shot or for two.

Here, by statutes passed at different times, Congress prohibited action which, so far as the crime of disposing of the money is concerned, would almost never be performed as part of the same transaction as the robbery itself.[1] There is thus no reason to hold that Congress did not intend to punish separately this further act of criminality even when performed by the robber. Under the two sections now involved (subsections (c) and (d)), there necessarily had to be at least two acts, at different times, as the result of different impulses, done for different purposes; there also had to be intents composed of distinct and independent elements of proof; the crimes were established by two separate sections passed at different times with different gists or purposes, and were based on prior statutes which had been interpreted as creating wholly separate crimes. *Supra*, p. 17. In the light of all these factors, there is no occasion, we sub-

[1] We are lodging with the Clerk the original trial transcript. It shows that petitioner did not even carry the money from the bank (Tr. 323). The loot consisted of currency and redeemed E Bonds (Tr. 44). It was counted later at an apartment (Tr. 327–328) in two parts (Tr. 328–329), and split (Tr. 337, 714, 732) and concealed in brown paper bags (Tr. 329). At the time of trial, no money had been recovered (Tr. 41, 43).

mit, to resolve doubt as to punishment by resort to the rule of lenity. Rather, both the language and the legislative history affirmatively show that Congress intended to provide additional punishment for the distinct violations of the separate statutes.

3. In particular, we believe that subsection (c) clearly establishes a separate crime for the robber when he so conceals or disposes of the stolen property that it is not recovered or restored to the rightful owner. As pointed out in footnote 7, *supra*, p. 22, at the time of petitioner's trial the stolen money had not been recovered; it has been so concealed and disposed of by petitioner and his confederates that the law enforcement officials could not find it. In such circumstances—when the robber goes beyond his robbery to keep permanently the loot or its proceeds—society certainly has an additional and special interest to protect, over and above its interest in preventing violent looting. The robber is enriched, and the true owner is permanently deprived of his property. A separate punishment for the separate conduct leading to that added injury is warranted.

III

SEPARATE PUNISHMENTS FOR ROBBERY AND DISPOSITION OF THE PROCEEDS DO NOT PRESENT A CONSTITUTIONAL ISSUE

Petitioner raises but does not labor the contention that separate punishments for the robbery and disposition of the proceeds would violate the constitutional provision against double jeopardy. The contention is clearly without merit. This Court held in *Gore* v.

United States, 357 U. S. 386, 392–3, that multiple punishment for violations of separate statutes arising out of one act of sale would not violate the constitution. This case, as discussed above, necessarily involves more than one transaction, more than one act of criminality. There would be no constitutional barrier to double punishment even under the view of the dissenting opinions in *Gore*. See also *Albrecht* v. *United States*, 273 U. S. 1, *Blockburger* v. *United States*, 284 U. S. 299; and the discussion in the Brief for the United States in the *Gore* case, No. 668, Oct. Term 1957, pp. 38 *ff*.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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